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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PARK PLACE ASSOCIATES, LTD.,
et al.,

Plaintiffs and Respondents,

v.

BELL GARDENS BICYCLE CLUB et al.,

Defendants and Appellants.

B167891

(Los Angeles County
Super. Ct. No. VC034786)

APPEALS from an order of the Superior Court of Los Angeles County.

Peter P. Espinoza, Judge. Affirmed.

Baker, Keener & Nahra, Robert C. Baker, Melissa S. Fink and E. Todd Trumper
for Defendants and Appellants The Bell Gardens Bicycle Club, LCP Associates, Ltd.,
Haig Kelegian, Robert Carter, and Walter J. Lack.

Greenberg Glusker Fields Claman Machtinger & Kinsella, Richard E. Posell and
James M. Toma for Defendants and Appellants George Hardie and Kard King, Inc.

Ferruzzo & Worthe, James J. Ferruzzo and John R. Pelle for Plaintiffs and
Respondents.

Defendants appeal from an order denying their motion to compel contractual arbitration of a lawsuit, and to stay proceedings in it. The dispositive issue is whether the claims advanced in the case fall within the reach of the parties' arbitration agreement. We affirm the order denying arbitration.

FACTS

The Bell Gardens Bicycle Club (the club) is a joint venture that conducts a card gaming club. The club's venturers consist of two limited partnerships, plaintiff Park Place Associates, Ltd. (PPA), and defendant LCP Associates, Ltd. (LCP), which owns the majority interest. PPA and its general partner, Key Play, Inc.,¹ have sued the club, LCP, and LCP's general partners, Haig Kelegian, Robert Carter, and Walter J. Lack,² as well as defendants George Hardie and his corporation Kard King, Inc. (KK; collectively Hardie), who are former members of PPA. The gravamen of the case is that Hardie and KK's 1999 sale to the club of their shares in PPA, which increased the disparity of LCP's and PPA's interests in the club, violated and is invalid under first-refusal provisions of PPA's partnership agreement.

According to the first amended complaint (FAC), before the transfer of interests in PPA, it owned a 35 percent interest in the club and LCP owned 65 percent, enabling it to act as the club's managing partner. Hardie, in turn, owned 46.05 of PPA's limited partnership units, and KK held an additional percentage unit. With that combined ownership, KK was general partner of PPA. However, under a 1996 settlement with the California Attorney General's Office, Hardie agreed to divest himself of his interests in

¹ References to PPA also include Key Play, unless the context indicates otherwise.

² The club, LCP, and LCP's general partners will be referred to collectively as the LCP defendants.

PPA, and thus in the club, by November 2000. In September 1999, Hardie, KK, the club, and LCP entered into an agreement under which the club would acquire Hardie's and KK's interests in PPA, for \$4 million. The club paid Hardie \$1.6 million and, acting through LCP's general partners, it executed a promissory note for the rest, with interest. At least 35 percent of the funds paid for this purchase allegedly were PPA's.

PPA alleged that in ostensibly selling his units to the club, Hardie breached provisions of PPA's limited partnership agreement, which provide that a limited partner who desires to transfer any partnership units to a third party must first offer them, on the same terms, to PPA's general partner on behalf of PPA, and if PPA elects not to purchase, then to its other limited partners. Only units not so transferred may then be sold to the third party. The limited partnership agreement twice provides that any sale of PPA units not accomplished in accordance with these provisions is null and void.

The FAC further alleged that after the sale the club – acting through LCP – converted Hardie's PPA units into a 16.4675 percent interest in the club. It then distributed that interest to PPA and LCP, in proportion to their original shares in the club, so that the resulting club ownership amounted to approximately 78 percent for LCP and 22 percent for PPA. The club's profits have since been distributed according to this structure.

Incorporating these allegations, the FAC asserted causes of action for (1) declaratory relief; (2) specific performance of the PPA partnership agreement, against Hardie and KK, and against the club, including rescission and cancellation of the sale to the club; (3) injunction; and (4) accounting, for the funds paid to Hardie for his units, and for profit distributions to PPA and LCP since the sale, under the new profit-sharing formula. In two other causes of action, PPA sought compensatory and punitive damages from Hardie and KK, for various breaches of fiduciary duty owed to PPA and its minority members, and from LCP and its general partners, for breach of duty under the Corporations Code as managers of the club.

The action was commenced on July 12, 2001. PPA soon brought a motion to disqualify the law firm representing the LCP defendants, because of alleged conflicts. The superior court granted the motion, and the LCP defendants appealed to this court. On petition for supersedeas, we stayed proceedings in the action. In October 2002, we reversed the order disqualifying counsel, and terminated the stay. Discovery recommenced at the turn of the year.

The PPA partnership agreement, alleged breach of which forms the basis of the FAC, does not contain an arbitration provision. The club's Agreement of Joint Venture (JVA), however, does, as relevantly set forth below.³ The present demand for arbitration arose from certain discovery PPA propounded in February 2003. During the deposition of defendant Carter (one of LCP's three general partners), PPA inquired extensively about Carter's and his colleagues' acquisition of their controlling interest in LCP, in 1999. PPA also questioned Carter about another card gaming facility the three partners partly owned, and about compensation the club had paid them, for management. When PPA's attorney thereafter posed a question about a company named Gaming Analysis, Inc., in which LCP's general partners had also been involved, Carter's attorney (also representing the club, LCP, and its other general partners) adjourned the deposition, stating that Carter was tired.

Counsel then wrote to PPA's attorney, taking "off calendar" Carter's deposition and those of his partners Kelegian and Lack, for the reason that PPA had been asking questions having no relation to the allegations of the FAC. Counsel suggested that PPA could amend its complaint, but concluded that the depositions would not recommence

³ "Any dispute or controversy arising under, out of, in connection with, or in relation to this Agreement, or any breach thereof, or in connection with the dissolution thereof, shall be determined and settled by arbitration in Los Angeles County pursuant to the rules of the American Arbitration Association. . . ."

until PPA “agree[d] to comply with the discovery statutes with an eye toward the allegations as presently constituted.”

PPA responded with a series of motions, to compel Carter to answer questions he had refused, to compel the depositions of Kelegian and Lack, and for appointment of a referee to oversee these depositions. The LCP defendants opposed these motions, and moved for a protective order, restricting PPA’s discovery to matters germane to the issues raised by the FAC. On March 26, 2003, the trial court granted PPA’s motions and denied the LCP defendants’. Among other things, the court observed that “ ‘Relevancy to the [subject] matter of the litigation is a much broader concept than relevancy to the precise issues presented by the pleadings.’ ” (Quoting *Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1760.)

Three weeks later, on April 16, 2000, the LCP defendants filed a motion to compel contractual arbitration of the case under the JVA’s arbitration provision. In their points and authorities, the LCP defendants admitted and indeed emphasized that, as pled, the case arose from and involved an alleged breach of PPA’s partnership agreement.⁴ However, the LCP defendants argued, in commencing and then supporting its deposition of Carter, PPA had extended its inquiry into unrelated matters, which PPA had stated involved possible breaches of the JVA. Accordingly, the matter now came within the reach of the parties’ agreement for arbitration, which should be ordered, with the lawsuit to be stayed. The LCP defendants also asserted, anticipatorily, that PPA could not properly claim the LCP defendants had waived their right to compel arbitration. (See Code Civ. Proc., § 1281.2, subd. (a); section references hereafter are to that code.)

⁴ For example, the memorandum stated: “All of the plaintiffs’ causes of action derive from rights and obligations contained in PPA’s own partnership agreement and a construction of its provisions”

Defendants Hardie and KK filed a joinder in the motion to compel arbitration.⁵ They argued, among other things, that the FAC's claims arose in connection with the JVA's arbitration provision, because they were premised on the LCP defendants' possessing a greater share in the club than the percentages the JVA originally provided (before the sale). In its opposing papers, PPA emphasized that it was not pursuing any claims for breach of the JVA, but that any misallocations of club funds to LCP's partners it might discover should be subject to rectification in the accounting of profits and distributions that the FAC prayed. PPA also argued that the LCP defendants had waived any entitlement to arbitration, and that even if some of the dispute were deemed arbitrable, the court should withhold arbitration under section 1281.2, subdivision (c).

The motion came on for hearing together with a host of discovery motions by the various parties. The court denied the motion to compel arbitration. In its minute order, the court averred that "The pleadings define the issues to be tried not the parties' pretrial discovery. . . . None of the seven causes of action allege a breach of the Joint Venture Agreement. . . . The fact that discovery requests might explore possible 'violations' of the joint venture agreement does not make that agreement controlling."

The trial court also ordered the discovery motions before it referred to the previously designated referee. However, after the LCP defendants and Hardie filed notices of appeal from the order denying arbitration, the court ruled that the appeals stayed all discovery proceedings in the case. We denied PPA's petition for extraordinary relief from this ruling, but granted PPA's and Hardie's motions to expedite the appeals.

⁵ Hardie and KK could not themselves petition to compel arbitration, because they were not parties to the JVA. (See § 1281.2, subd. (a).) Although Hardie now cites case law to the effect that arbitration agreements may apply to general partners of a contracting partnership, these cases involve claims asserted between the partnership and another contracting party. They would not entitle Hardie and KK, as former partners in PPA, to assert the JVA's arbitration clause against their own partnership, with respect to its claims against them.

DISCUSSION

The proceedings under review arose under section 1281.2, which provides, with certain exceptions (*id.*, subds. (a)-(c)), that the court shall order arbitration of a controversy with respect to which there exists “a written agreement to arbitrate” The issue presented is whether PPA’s action against Hardie and the LCP defendants propounded or embraced a controversy for which arbitration was prescribed by the JVA’s arbitration provision. This question is ultimately one of construing and applying that provision, and absent a resolution of conflicting facts by the trial court, we review the issue de novo. (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.) Here the court did not confront any such factual conflicts. The factual issues that PPA posits, such as whether the FAC arose out of a breach of the JVA, were legal ones.

Agreements to arbitrate are liberally construed in favor of arbitration. (6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 492, p. 920.) “On the other hand, there is no policy to compel persons to accept arbitration of controversies that they have not agreed to arbitrate.” (*Id.* at p. 921.) With these complementary principles in mind, we examine defendants’ rationales for their claim that the present case is subject to arbitration under the JVA. The LCP defendants and Hardie advance distinct arguments in this regard.

As they did below, the LCP defendants do not contend that the controversy set forth in the FAC involves an alleged breach of the JVA or is per se subject to arbitration under it. Rather, these defendants contend (as below) that through its pretrial discovery PPA has converted the lawsuit into one that asserts and seeks relief for alleged breaches of the JVA.

The LCP defendants support and document this contention by reference to arguments PPA made on the motions to compel and to restrict discovery, after LCP’s attorney discontinued the depositions of LCP’s general partners. The most prominent example was PPA’s assertion that a loan by the club to the corporation Gaming Analysis, Inc., partly owned by those partners, was subject to discovery because it violated the

JVA, and could affect the accounting of profits PPA sought under the FAC. Other discovery references adduced did not in terms refer to the JVA, but concerned the possibility that LCP and its partners may have made unreasonable expenditures of club funds while managing it. Through this discovery, the LCP defendants contend, PPA is litigating claims of breach of the JVA, which are subject to arbitration, or at least is conducting civil discovery in contemplation of pursuing arbitrable claims in the future. In this connection, defendants point to PPA's statement that "[p]laintiffs are entitled to discovery of the subject matter of the [FAC] in order to determine whether there is support for additional causes of action which may result in the appropriate motion to amend the [FAC]."

We do not agree with the LCP defendants that PPA's discovery efforts and arguments render the action subject to arbitration under the JVA. This discovery – whose breadth the trial court for better or worse has approved – has not created any “dispute or controversy,” to quote the JVA and section 1281.2, different from the one embodied in the FAC. PPA is litigating only the same claims: discovery extending beyond their operative facts does not constitute litigation of a further claim. That the discovery might ventilate other, arbitrable claims does not change the scope of those in the lawsuit. Were PPA to seek to amend its pleadings to assert new claims falling within the arbitration agreement, that might provide grounds to compel arbitration, at least of those claims. But even the assertion of such claims would not necessarily require arbitration of the FAC's controversy about the alleged invalidity, under the PPA partnership agreement, of Hardie and KK's sale of their PPA shares. (See § 1281.2, subd. (c).)

The LCP partners further argue that by averring, in defense of their discovery, that JVA violations such as the loan to Gaming Analysis may affect the accounting that the FAC seeks, PPA has “subsumed such actions” into the FAC, and is litigating them under it. But this too is an exaggeration. PPA only has undertaken discovery about transactions such as the Gaming Analysis loan. And there has been no adjudication that the accounting of club profits the FAC seeks, as a remedy for the allegedly voidable

reallocation of club shares based on the Hardie sale, properly would involve adjustment of accounts by reason of other transactions. In short, the LCP defendants' dissatisfaction again involves pretrial discovery, which neither mirrors nor controls the issues determinable under the FAC. The LCP defendants have failed to establish that there are issues subject to dispute and litigation that come within the JVA's arbitration provision.

Hardie's argument in support of compelling arbitration proceeds on a different track. Emphasizing the verbal breadth of the JVA's arbitration provision – “arising under, out of, in connection with, or in relation to this Agreement . . .” (see *ante*, fn. 3) – Hardie argues that PPA's present claims, as set forth in the FAC, fall within it. Hardie cites cases stating that clauses requiring arbitration of disputes “arising in connection with” or “arising out of or related to” the principal agreement extend to controversies “having a significant relationship to the contract” (*Simula, Inc. v. Autoliv, Inc.* (9th Cir. 1999) 175 F.3d 716, 721) or “root[ed] in the relationship between the parties which was created by the contract.” (*Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999, 1003.)

Admitting that the FAC's claims against Hardie and KK arise out of the sale of their PPA shares, Hardie proceeds to urge that “This dispute over Hardie and [KK's] sale of their PPA interest is connected with and related to the joint venture agreement” But this is a colloquial argument, and ultimately an ipse dixit, not supported by the authorities just noted. The dispute about the validity of Hardie's sale of shares in PPA, on which the FAC is based and around which it revolves, arises from Hardie's duties under PPA's partnership agreement, not the JVA. The same is true of PPA's tort claim against Hardie, for breach of fiduciary duties arising from the PPA partnership relationship. PPA is suing Hardie and KK as former constituent partners, for breaches of that partnership, and these claims are not “in connection with, or in relation to th[e club Joint Venture] Agreement.”

Hardie's argument that PPA's claims against the LCP defendants are subject to arbitration by reason of connection or relationship to the JVA are also unavailing. The

FAC's first five causes of action seek equitable relief to undo the consequences of Hardie's alleged breach of the PPA partnership agreement. This relief would include rescission of Hardie's sale to the club, and an accounting for distributable club profits that were allocated on the assumption that the sale had altered PPA's and LCP's shares in it. The LCP defendants are named in the first through fifth causes of action for these remedial purposes, grounded in the alleged breach of the PPA partnership agreement.

These claims do not relate to the JVA. Hardie argues that they do, because the JVA prescribes PPA's and LCP's original share percentages, which the FAC contends have been improperly altered by reason of the Hardie sale. But the fact that the JVA would provide an evidentiary yardstick for the accounting simply does not mean that the underlying dispute, about the propriety of Hardie's disposition of his PPA shares, relates to that agreement.

Marsch v. Williams (1994) 23 Cal.App.4th 250 is illustrative. In that case, Marsch owned part of two partnerships that held commercial buildings (collectively La Jolla). Williams acquired the remaining shares of La Jolla. The La Jolla partnership agreements did not contain arbitration clauses. However, Marsch and Williams also were partners in Horizon, a partnership that owned and planned to develop land elsewhere in San Diego County, and Horizon's partnership agreement did provide for arbitration of partners' disputes.

Marsch claimed that Williams sought to acquire Marsch's Horizon interest cheap, and to that end Williams withheld support from Horizon's and La Jolla's projects. As a result, the Horizon project stopped, and Williams put La Jolla into involuntary bankruptcy. Marsch sued Williams in tort, first with respect to Horizon. That case was ordered arbitrated under the Horizon agreement. After decision, Marsch sued Williams for his conduct with respect to La Jolla. Williams again petitioned for arbitration, but the trial court denied it, ruling that the action with respect to La Jolla was not related to the Horizon agreement. Appealing, Williams argued that the case was arbitrable because it alleged that Williams had acted vis-à-vis La Jolla as part of his attempt to gain control of

Horizon. The Court of Appeal affirmed the denial of arbitration, observing in part that the action sought “to vindicate the rights created by the La Jolla agreements,” and “the evidence Marsch may choose to employ in proving his claims will not, by itself,” serve to invoke the Horizon arbitration agreement. (*Marsch v. Williams, supra*, 23 Cal.App.4th at p. 257.)

The FAC also contains two causes of action for damages for breaches of partners’ fiduciary duties (see Corp. Code, § 16404). The sixth cause, asserted against Hardie and KK as partners in PPA, arises from that partnership, and does not relate to the JVA, for all of the reasons discussed above. The seventh and final cause of action is somewhat different. Filed against LCP and its general partners, it alleges that by various acts abetting and implementing the Hardie sale, these defendants, effectively as managing partners of the club, breached their duties to PPA, and damaged it by the loss of Hardie’s PPA shares and profit distributions from the club. Although the seventh cause arises from essentially the same transactional facts as underlie the rest of the FAC, its legal basis is, in part, the partnership relationship of the parties in the club. This might well bring this cause within the JVA’s arbitration clause.

But even if the trial court should have ruled that the seventh cause of action fell within the arbitration provision, defendants still would not have been entitled to an order to arbitrate the rest of the case – or, most likely, the seventh cause itself. Under subdivision (c) of section 1281.2, the pendency of the rest of the lawsuit, posing much the same facts and controversy (under the PPA partnership agreement) as the seventh cause, would have authorized withholding any order to arbitrate that cause, at least until the outcome of the litigation established whether such arbitration was necessary.

DISPOSITION

The order denying the motion to compel arbitration and stay the action is affirmed.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.